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## United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Moran	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 CR 1086	DATE	3/26/2003
CASE TITLE	United States of America vs. Brian Keller		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

**MOTION:**
**Memorandum Opinion and Order**
**DOCKET ENTRY:**

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] Enter Memorandum Opinion and Order. Defendant's motion to dismiss the indictment is denied. Status hearing set for April 9, 2003 at 9:15am.

- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	U.S. DISTRICT COURT CLERK 03 MAR 26 PM 2:44 FILED-10	number of notices <div style="border: 1px solid black; padding: 5px; font-weight: bold; font-size: 1.2em;">MAR 27 2003</div> date docketed <div style="border: 1px solid black; padding: 5px; font-family: cursive;">PP</div> docketing deputy initials date mailed notice mailing deputy initials	<div style="background-color: #cccccc; padding: 5px; font-weight: bold;">Document Number</div> <div style="border: 1px solid black; padding: 50px 0; font-size: 2em; font-family: cursive;">21</div>
WAH courtroom deputy's initials	Date/time received in central Clerk's Office		

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

BRIAN KELLER,

Defendant.

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No. 02 CR 1086

DOCKETED  
MAR 27 2003

MEMORANDUM OPINION AND ORDER

Brian Keller (Keller) moves to dismiss the indictment against him. For the following reasons, his motion is denied.

On July 4, 2002, Keller was arrested in a park in Chicago. On August 21, 2002, he pled guilty to the state charge of being a felon in possession of a firearm. He was sentenced pursuant to a plea agreement to three years in custody and was subsequently incarcerated in a state facility. On Nov. 12, 2002, a federal grand jury indicted Keller based on the same facts that underlay the state charges. He is now charged with being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1), which provides that it shall be unlawful for a felon to "possess, in or affecting any commerce, any firearm or ammunition."

Defendant challenges this indictment as an unconstitutional extension of the government's Commerce Clause power. He recognizes that the Seventh Circuit has already found that the statute on which the indictment is based is a constitutional regulation of commerce. U.S. v. Bell, 70 F.3d 495, 497-498 (7<sup>th</sup> Cir. 1995). But he asserts that the statute lies on the outer fringe of Congress' power and the unique facts of this case take it outside of the contemplated scope. As background for his argument, defendant highlights Supreme

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Court cases which have limited the enactment or application of federal statutes created under the Commerce Clause. Each of these cases addresses the issue of whether the conduct regulated in a federal statute has a sufficient nexus with interstate commerce to bring it within the scope of the Commerce Clause. United States v. Lopez, 514 U.S. 549 (1995) (possession of a firearm in a school zone did not substantially affect interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (gender-motivated violence does not substantially affect interstate commerce); Jones v. United States, 529 U.S. 848 (2000) (federal arson statute, when used to prosecute for damage to private residences, not within the scope of the commerce clause power). These cases, defendant argues, show that the federal felon-in-possession statute lies at the edge of the government's Commerce Clause reach.

Defendant continues that because he has already been tried and convicted in state court for the same offense, this prosecution is an unconstitutional application of § 922(g)(1).<sup>1</sup>

Defendant recognizes that the Seventh Circuit would likely reject any arguments that federalism would bar the government's power to enact or prosecute under the statute, U.S. v. Wilson, 73 F.3d 675, 684 (7<sup>th</sup> Cir. 1995)(confirming the "well-established principle that Congress may regulate conduct even though that conduct already violates state law"), but argues that nevertheless the federal government's choice to charge him after his conviction disturbs the existing federal/state balance. Similarly, while he recognizes that the Department of Justice Petite policy, which presumes that a prior resolution of a case arising from the same act or transaction vindicates relevant federal interests in the offense, does not provide him


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<sup>1</sup>The parties agree that under existing precedent the government's prosecution of defendant, based on the same offense that precipitated his state court conviction, does not constitute double jeopardy. See U.S. v. Tirrell, 120 F.3d 670, 676-677 (7<sup>th</sup> Cir. 1997).

with any substantive rights, U.S. v. Mitchell, 778 F.2d 1271, 1276 (7<sup>th</sup> Cir. 1985), he asserts that the principle behind the policy is undermined by this prosecution. Defendant asks us to find that the state interest in controlling local criminal activity, combined with the federal government's policy to avoid prosecution when its interests have already been vindicated, while not enough to invalidate this indictment on their own, breaks the arguably tenuous connection that the federal felon-in-possession statute has to interstate commerce.

Defendant, in a thoughtful and creative presentation, brings up salient points regarding the effectiveness of a federal prosecution brought after a conviction for an analogous state crime. But even in the aggregate these points do not render the prosecution unconstitutional under the Seventh Circuit's reading of the Commerce Clause. We are similarly not persuaded by defendant's argument to dismiss the indictment on statutory construction grounds. Defendant will have a chance to argue that the government has failed to prove the commerce element required under the statute if this case goes to trial.

For the above reasons, defendant's motion to dismiss the indictment is denied.

  
\_\_\_\_\_  
JAMES B. MORAN  
Senior Judge, U. S. District Court

March 26, 2003.